DEC 8 1955
HAROLD B. WILLEY, Cl

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 409

W. H. WILSON, Executor of the Estate of Birdine Fletcher, Deceased, and SISTERS OF ST. FRANCIS, a Corporation,
Petitioners,

VERSUS

A. J. SIMLER,
Respondent.

PETITION FOR REHEARING ON THE SUMMARY DECISION OF THE COURT ON NOVEMBER 14, 1955

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December, 1955.

HITTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-8780

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PETITION FOR REHEARING ON THE SUMMARY DECISION OF THE COURT ON NOVEMBER 14, 1955

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This is a petition for rehearing from the granting of a judgment on November 14, 1955, and summarily deciding this matter, on a petition for certiorari. We request the Court to vacate its summary decision and set the case for argument on the summary calendar on the granting of summary judgment, in deciding this case summarily we believe the Court overlooked and did not take into account certain relevant considerations which were not considered or taken into account because they were not and could not

be adequately presented in a petition for certiorari and in our brief in opposition.

In Oklahoma the probate court has no equity jurisdiction, as we believe the Illinois and Texas courts had on which *Sutton* v. *English* and *Pufahl* v. *Estate of Parks* were decided. The Congress in 1948 amended Title 28, U.S.C.A., Sec. 2283, which gives the federal courts power to issue injunctions where necessary to its jurisdiction or to protect or effectuate its judgments. *Markham* v. *Allen,* the other case cited in the summary order, was decided in 1946. We believe the Court did not consider this amended statute in summarily deciding this case.

STATEMENT

A. J. Simler, the brother of Birdine Fletcher, deceased, was devised $1.00 by her will which was written by the principal beneficiary and the residue of the estate, which included an oil bearing farm in Caddo County, Oklahoma, was devised to named institutions which were owned and controlled by the Sisters of St. Francis, a foreign corporation. The will was admitted to probate over his objections and he filed a suit in the federal court to have said residuary clause of the will so far as it covered a farm in Caddo County, Oklahoma, declared void because of the incapacity of the devisee to take, own and hold real estate located outside of a city or town. The District Court dismissed his action and on appeal the Court of Appeals reversed the case (*Simler* v. *Wilson,* 210 F.2d 99, November 1953) and held the Sisters of St. Francis, corporate legatee, could not take the property and no title vested in devisee

and instead title vested in A. J. Simler on July 13, 1952, the date of her death (certiorari denied 347 U.S. 954. Rehearing denied. Motion to Stay proceedings also denied, 347 U.S. 974). On June 14, 1954, the District Court entered judgment on the mandate and adjudged as between the Sisters of St. Francis and the executor, W. H. Wilson, that the devise in the will was void and that title to the land vested in A. J. Simler, and this judgment is final and adjudicates the title to the farm and runs as between these parties. In order to enforce this judgment on his farm and to obtain benefits therefrom Simler filed other cases in the Federal District Court against the oil company who was producing the oil from his farm and to obtain injunction against W. H. Wilson the executor and the Sisters of St. Francis, who (being represented by the same attorneys) continued to defy and disregard this judgment and disobey the injunction of the court, and continued to try to relitigate the federal judgment and get the oil runs and did on November 30, 1954, obtain an order of the County Court of Oklahoma County in its final decree of distribution subjecting the land and income accruing therefrom since July 13, 1952, which had been decreed to A. J. Simler:

> "to the payment of all debts, expenses of administration, including estate and income taxes, and all specific legacies with interest to March 30, 1954"

which subjected the farm of A. J. Simler appraised at $150,000.00 to something over $155,000.00 in debts and costs which in effect would nullify and circumvent the Federal Court Judgment in favor of A. J. Simler obtained in November, 1953, and thereby permit the Sisters of St. Francis

to nullify the provisions of the Constitution and Statutes of the State of Oklahoma and would permit the corporation to take indirectly that which it is prohibited from taking directly.

The District Court dismissed the suit of Simler against the oil company and issued a qualified injunction to prevent relitigation in another case and refused a temporary injunction against the Sisters in the third case, all of which A. J. Simler appealed to the Court of Appeals who reversed all three cases and directed the District Court to enter judgments in favor of Simler against the oil company for the oil runs, and in favor of Simler against the Sisters to quiet his title to the farm and against the executor for $13,585.12 (being the difference between the total runs collected on the Simler farm by the executor and the amount of Simler's 53 per cent of the costs of administration, taxes and legacies. For breakdown on this see pages 9, 10 and 11, of Supplemental Brief of Appellant in Court of Appeals in consolidated cases 5129, 5130, and 5131) all of which judgments the Federal District Court entered and the oil company judgment and the judgment against the executor were paid by them and discharged and they gave notice of appeal to the Court of Appeals. They also petitioned this Court a third time for certiorari in this case. This litigation has been in process in the County, District and Supreme Court of Oklahoma and the Federal District Court and Court of Appeals and this Court and the facts are very complicated and not easy to present in a brief.

In granting a summary judgment in this matter we believe the Court did not consider the facts that in Okla-

homa the probate court is without equitable powers, and the amended statute Title 28, U.S.C.A., Sec. 2283. For that reason we ask a rehearing and for hearing on the summary calendar.

INTERVENING CIRCUMSTANCES SINCE NOVEMBER 14, 1955

1. W. H. Wilson, Executor of the Will and estate of Birdine Fletcher, deceased, on November 16, 1955, filed a petition in the District Court of Oklahoma County, against A. J. Simler, and others claiming for the estate and for the residuary legatee Sisters of St. Francis the sum of $54,-624.16, being the judgments for the oil runs from the farm collected by A. J. Simler.

OTHER SUBSTANTIAL GROUNDS AVAILABLE BUT NOT PRESENTED

1. In Title 28, U.S.C.A., Sec. 2283 was amended in 1948 which as amended provides that a court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment. This amendment was enacted after the opinions of this Court in *Sutton* v. *English* (1918), *Estate of Parks* v. *Pufahl* (1936), and *Markham* v. *Allen* (1946).

2. The farm willed to the Sisters of St. Francis, in the residuary clause of the will was testate property. It was a Federal Court Judgment in favor of A. J. Simler, against the residuary legatee (Sisters of St. Francis, a corporation) and the executor that prevents the Sisters of St. Francis from taking the farm. We contend the farm was testate property under the Will but by this Federal Court Judgment title to the farm was vested in A. J. Simler.

ORDER

"*Per Curiam*: The petition for Writ of Certiorari is granted. The judgments of the Court of Appeals are vacated and the judgments of the District Court reinstated. *Sutton* v. *English*, 246 U. S. 199. See *Markham* v. *Allen*, 326 U. S. 490, 494, *Pufahl* v. *Estate of Parks*, 299 U. S. 217, 226, Mr. Justice Black Dissents."

QUESTIONS PRESENTED

(1) Can a judgment of the Federal Court rendered in June, 1954, based upon a Judgment of the Court of Appeals rendered in November, 1953, which adjudicated as between an heir resident of Arkansas and the executor of the principal beneficiary of an estate, that the beneficiary could not take, own, or hold a farm in Oklahoma, be circumvented, frustrated and nullified by the County Court of Oklahoma County, in a decree of distribution by County Court charging the farm appraised at $150,000.00 with the payment of all the legacies, taxes and all costs of administration amounting to more than the appraised value of the farm and thereby indirectly taking the farm, under the residuary

clause of the Will when they were prohibited from the taking of the farm by the Federal Court Judgment.

(2) Where it is necessary to protect and effectuate his Federal Court Judgment, does an heir and citizen of Arkansas have a right to proceed in the Federal Court by:

1. Injunction to prevent the Executor and principal beneficiary from defeating his judgment and taking his farm and income therefrom by their actions in the County Court and the State Courts, and,
2. By action to quiet title against them to his farm, and,
3. By action against the oil producer to collect the oil income from his farm.

REASONS FOR REHEARING ON THE ORDER JUDGMENT OF NOVEMBER 14, 1955, AND FOR DENYING THE WRIT

1.

The plaintiff had a right to enforce his judgment against the Executor of the Estate and the principal beneficiary to quiet the title to his farm.

2.

This order will prevent plaintiff from enforcing a valid Federal Court Judgment.

3.

The order cites cases that were decided prior to the 1948 amendment of Title 28, U.S.C.A., Sec. 2283, which

amended statute provides: A Court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or, where necessary in aid to its jurisdiction, or to protect or effectuate its judgment.

WHEREFORE, it is very respectfully submitted that this petition for rehearing be granted and that the Court vacate its summary decision and set the case down for hearing at least on the summary calendar, so the matter, as complicated as this litigation, and as far reaching as this judgment, may be argued and presented.

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December, 1955.

SPECIFICATION OF ERROR

We believe this Court erred in granting certiorari and summarily deciding this case and vacating the judgment of the Court of Appeals, on the combined three cases, and reinstating the judgments of the District Court.

SUMMARY OF THE ARGUMENT

The Oklahoma County Court does not have jurisdiction to try title to real estate. (Art. 7, Secs. 12 and 13 of the Oklahoma Constitution provides that the County Court has no jurisdiction to try title to real estate). Nor does the County Court have equitable powers (*In re Mize Guardianship*, 93 Okla. 164, 142 P.2d 160). To burden that real estate with liens and encumbrances, and thereby circumvent a valid federal judgment rendered prior to the County Court Decree is the use of equitable power.

The Oklahoma probate court has limited authority. Probate courts have no authority under probate procedure to adjudicate title to property, or to compel its return. (*Taliferro* v. *Reirdon* [1940], 186 Okla. 603, 99 P.2d 522.) When there is a valid federal court judgment in favor of one heir (A. J. Simler) against the executor and the residuary legatee, granting the heir title to real estate, we do not believe the County Court can enter an order of distribution that "Comes in the back Door" and takes away that property by liens affixed by the County Court, and in effect nullifies and frustrates the judgment of the Federal Court and makes it ineffectual.

In the County Court Decree Dated November 30, 1954, distributing the farm to A. J. Simler and subjecting it;

> "To the payment of all taxes, debts, expenses of administration including estate and income taxes, and all specific legacies with interest to March 30, 1954."

the County Court in effect nullified the judgment of the Federal Court of June 14, 1954, holding:

> "IT IS ORDERED AND ADJUDGED that the attempted devise by Birdine Fletcher, deceased, in her Last Will and Testament admitted to probate in County Court of Oklahoma County, Oklahoma, of the following described real estate, to-wit:
>
> > The Northwest Quarter of Section Thirty-four (34) Township 6 North, Range Ten (10) West of the I. M. in Caddo County, Oklahoma.
>
> to defendant, Sisters of St. Francis, a corporation, is void and no title to said real estate vested in said defendant, Sisters of St. Francis, a corporation, but title to the above described land vested in plaintiff as the sole and only heir of Birdine Fletcher, deceased, immediately upon her death on June 13, 1952, under the law of descent in Oklahoma.
>
> "IT IS FURTHER ORDERED that plaintiff application for permanent injunction against defendant, Sisters of St. Francis, a corporation, is denied.
>
> "Entered this 14th day of June, 1954.
>
> "W. R. WALLACE
>
> "UNITED STATES DISTRICT JUDGE."

To sustain this theory we contend the Court of Appeals did not assume probate jurisdiction in directing the

Federal District Court to enter judgments to vitalize and enforce the judgment of June 14, 1954, so A. J. Simler could obtain the fruits of his victory and some monetary benefits therefrom. The court assumed an equity power it has by injunction to prevent the executor and the residuary legatee from frustrating and nullifying the judgment of the Federal Court.

We believe the court did not consider the amendment to Title 28, U.S.C.A., Sec. 2283, made in 1948 long after the decisions cited in the order of this Court. The purpose of this amendment was to overcome the effect of the decisions of this Court, prior to that 1948 amendment. The amended statute provides that the Federal Court has power, where necessary, in aid of its jurisdiction, to issue injunctions to prevent relitigation in State Courts such as issued here and to protect or effectuate its judgment. See *Jackson* v. *Carter Oil Co.*, 179 F.2d 524, *certiorari denied*, 340 U.S. 812, 91 Sup. Ct. 39, 95 L. Ed. 597, where it was held that the Federal Courts can enforce its judgments.

We obtained the farm and the oil runs by Federal Court Judgment on which this Court refused to grant *Certiorari* and which is final. Now we cannot vitalize or enforce the judgment.

The farm and the runs are charged with all the costs, taxes and legacies which amount to more than the appraised value of the farm. Thereby in effect denying A. J. Simler, a resident of Arkansas, a right to enforce a final judgment between him on the one hand and the executor

and Sisters of St. Francis on the other adjudicating his title to the farm granted by the Federal Court in Oklahoma.

Where a federal court first obtains jurisdiction of the subject matter in controversy, it may enjoin all proceedings in a state court, commenced afterwards, which would have the effect of defeating or impairing its jurisdiction, or the lawful effect of its orders or decrees, or titles which it has made in the exercise of that jurisdiction. See *Looney* v. *Eastern Texas R. Co.*, 247 U.S. 214, 62 L. Ed. 1084. See also, *Kline* v. *Burke Const. Co.*, Ark., 260 U.S. 226, 67 L. Ed. 226; *Jefferson Standard L. Ins. Co.* v. *Keeton*, 292 Fed. 53; *St. Louis-San Francisco Ry. Co.* v. *McElvain*, 253 Fed. 123; *Swift* v. *Black Panther Oil and Gas Co.*, Okla., 1917, 244 Fed. 20, 156 C.C.A. 448.

Where a federal court has first obtained jurisdiction of a matter in controversy by the institution of a suit therein it may restrain proceedings in any other court involving the same subject matter. See *Gunter* v. *Atlantic Coast Line R.*, 200 U.S. 273, 50 L. Ed. 477; *Providence and N. Y. S. Co.* v. *Hill Mfg. Co.*, 109 U.S. 578, 27 L. Ed. 1038.

Federal equity court, first acquiring jurisdiction of cause, may enjoin proceedings at law in state court, though latter's process was first served. See *Brown* v. *Pacific Mut. Life Ins.*, 62 F.2d 711.

Federal courts will enjoin proceedings in state courts with reluctance, and only in those exceptional cases which call for interposition of court of equity to prevent irreparable injury which is clear and imminent. *Red Rock Cola Co.* v. *Red Rock Bottlers*, 195 F.2d 406.

A court has power and authority to issue all writs and orders to preserve and maintain jurisdiction of the principal cause of action as well as the parties thereto. *U. S.* v. *Western Pa. Sand and Gravel Ass'n*, 114 F. Supp. 158.

In *Wells* v. *Helms*, 105 F.2d 402, at 404, the Court said:

> "However, a distributee of an estate, citizen of another state, may establish his right to a share in such estate, and enforce such adjudication against the administrator personally or his sureties, or against any other person liable therefor, or proceed in any way which does not disturb the actual possession of the property by the State Court, *Byars* v. *McAuley*, 149 US 608, 615, 13 S. Ct. 906, 37 L Ed 867. *Waterman* v. *Canal-Louisiana Bank Co.* 215 U. S. 33, 44, 30 S. Ct. 10, 54 L. Ed. 80. *Commonwealth Trust Co.* v. *Bradford*, 297 US 613, 619, 56 S. Ct. 600, 80 L Ed 920. *Princess Lida of Thurn* v. *Thompson*, 305 US 456, 59 S. Ct. 275, 281, 83 L. Ed. 285."

These Federal Court Judgments were to prevent the executor and Sisters from circumventing and nullifying the Federal Judgment previously obtained by Simler. This Court has now held by its order that this Federal Judgment cannot be enforced in the Federal Court.

Under this order we are in the position of having a valid judgment of the United States District Court of June 14, 1954, which cannot be enforced in the Federal Court and A. J. Simler is relegated to the Oklahoma Probate Court (which does not have equitable jurisdiction or right to try title to land) to obtain enforcement of a Federal Judgment, defeating the very purpose of Federal Court Jurisdiction in cases of this kind.

In *Berman* v. *Denver Tramway Corp.*, 197 F.2d 946, at page 950, the Court of Appeals held:

> "A federal court is clothed with power to secure and preserve to parties the fruits and advantages of its judgment or decree. In the appropriate exercise of that power, the court has jurisdiction through means of a supplemental proceeding to enjoin the relitigation in a state court of a matter litigated, determined, and adjudicated by its valid decree regularly entered, if the result of the relitigation would be to destroy the effect of the decree rendered in the United States Court and jurisdiction of the Court to entertain such a supplemental proceeding is not lost by the intervention of time or the discharge of the *res* from the custody of the court. A supplemental proceeding of that kind may be entertained where the relitigation in the state court would result in nullifying the judgment or decree of the United States Court, or would render doubtful the rights of the parties in respect to the effectiveness of such judgment or decree (citing cases).
>
> "And for the purpose of protecting the effectiveness of its judgment or decree, a United States Court may entertain an independent action rather than a supplemental proceeding in the original action to enjoin the relitigation in a state court of matters already fully adjudicated in the United States Court, (Citing cases). Viewed in the light of these cases, it is clear that for the purpose of effectuating and protecting the final decree rendered in 1924, the court had jurisdiction to entertain the supplemental proceeding to enjoin Berman from relitigating in the State Court issues and controversies previously litigated and adjudicated in such final decree."

The Court of Appeals in aid of its jurisdiction and to protect or effectuate its judgment in 210 F.2d 99 and the judg-

ment of the District Court based thereon dated June 14, 1954, held:

> "The Court concludes that any further charge against the above described land and the income it has produced since title vested in Simler on July 13, 1952, would go to Sisters of St. Francis, a corporation, as residuary legatee and the contention of Appellees that all of the debts, costs of administration, taxes and all specific legacies, with interest, of the Estate of Birdine Fletcher Deceased, should be borne and paid out of the above described land and income it has produced after title vested in Simler is untenable for the reason that such charge would in effect take the land from Simler, convert it into cash and give the cash to Sisters of St. Francis, a corporation, which would nullify and frustrate the judgment of this Court and would nullify the provisions of the Constitution and Statute of Oklahoma prohibiting the corporation from taking, acquiring, holding or owning the land and would permit the corporation to take indirectly that which it is prohibited from taking directly."

Under the amended statute, Title 28, U.S.C.A., Sec. 2283, the Court was not interfering with probate jurisdiction, nor trying to marshall assets, but was trying "in aid of its jurisdiction to protect and effectuate its judgments."

In *Sutton* v. *English*, 210 U.S. 199, at page 206, this Court said:

> "The county court has the general jurisdiction of a probate court * * * and general authority to hear and determine any case, either of law or equity, but subject to certain limitations, * * *."

In *Pufahl* v. *Estate of Parks*, 299 U.S. 217, this Court said at page 229:

> "The claimant has only to present and prosecute his demand in the probate court, which has jurisdiction both of legal demands and those cognizable in equity."

We believe these cases were based upon state statutes that provided the probate court had equity powers. In Oklahoma the probate court does not have equitable jurisdiction. This is one of the many distinctions between these cases and the case at bar.

In *Markham* v. *Allen*, 326 U.S. 490, at page 494, this Court said:

> "It is true that a federal court has no jurisdiction to probate a will or administer an estate * * * But it has been established by a long series of decisions of this court that federal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court."

The Oklahoma Probate Court, not having equitable powers (see *Mize's Guardianship*, 93 Okla. 164, 142 P.2d 116), the judgment of a federal court in the exercise of its equitable powers could not conflict or infringe on the jurisdiction of a court not having this power.

Only a testator can omit property from his will. It is of course true that A. J. Simler did not take the property under the will of his deceased sister, he took the land BY VIRTUE OF A JUDGMENT RENDERED BY THE COURT OF APPEALS AND THE UNITED STATES DISTRICT

COURT FOR THE WESTERN DISTRICT OF OKLAHOMA. The property, although willed to the Sisters of St. Francis, they were barred by the Oklahoma Constitution and Statutes and the judgments of the federal courts from taking it.

If the total probate expenses amount to $155,000.00 and the oil and the farm are used to pay this sum, then the size of the residuary estate is increased by $155,000.00. The Sisters then are taking that which the judgment of the Federal Court says they cannot, they are taking a portion of the farm, if not all of it. They are circumventing the judgment of the federal courts. They are, despite the judgment which clearly states they cannot, taking a $155,000.00 interest in the Caddo County lands.

It may be that in the answer brief filed by us on the Petition for Certiorari we failed to make the position clear and understandable, it may be that we failed for the reason that to us the matter was so just and correct that any enlargement on our part was unnecessary.

In any event it is in the hopes that in order to protect a federal court judgment from being frustrated, nullified and circumvented and to grant to A. J. Simler the fruits and advantages of his judgment that this petition for rehearing is submitted.

If the Amended Federal Statute means what it says the Court can issue injunctions where necessary in aid of its jurisdiction or to protect or effectuate its judgments.

CONCLUSION

For the foregoing reasons, the Court should sustain this petition for rehearing and vacate the summary judgment and set the case down on the summary calendar for argument and deny the petition for a writ of certiorari.

Respectfully submitted,

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December, 1955.

CERTIFICATE

This is to certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay, and, although not limited to is based partly on change of conditions since November 14, 1955, and intervening circumstances and to other substantial grounds available to petitioner for this Rehearing although not previously presented, which it is believed are substantial and of controlling effect.

LESLIE L. CONNER.